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EPA -- REGION 10

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the matter of:)	
)	DOCKET NO. CWA-10-2003-0007
)	
Thomas Waterer)	
and)	MOTION FOR DEFAULT
Waterkist Corp. dba Nautilus Foods)	
Valdez, Alaska)	
)	
Respondents.)	
)	
)	
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)	

INTRODUCTION

Pursuant to 40 C.F.R. §§ 22.16(a) and 22.17(b), Complainant moves for default. For good cause shown, Respondents should be held liable for the violations alleged in the complaint and the proposed penalty should be assessed against them.

BACKGROUND

On December 11, 2002, the Region filed its Complaint in the above-captioned matter. Service by mail was attempted on Respondents, but was refused. Declaration of Melissa Whitaker, attached hereto as Exhibit A. On December 18, the undersigned phoned Respondents' counsel inquiring why service of the Complaint had been refused. Declaration of Mark A. Ryan, attached hereto as Exhibit B, ¶ 2. On December 23, 2002, counsel for Respondents filed an "Acceptance of Service of Summons and Complaint," which stated that Respondents were

accepting service as of December 19, 2002.

Under 40 C.F.R. section 22.15(a) Respondents have 30 days from service to file an answer to the Complaint. The first business day following the 30 days from December 19, 2002, is January 21, 2003. On January 28, 2003, Counsel for Complainant called Respondent's counsel inquiring when an answer to the Complaint would be filed. Declaration of Mark A. Ryan, ¶ 3. Counsel for Respondents stated that an answer would be filed soon. Id. The undersigned informed Respondents' counsel that a motion for default would be filed if an answer to the Complaint were not received by the week of February 3, 2003. Id. As of the date of the filing of this Motion, no answer to the Complaint has been filed with the Regional Hearing Clerk, or received by the undersigned counsel. Id.

ARGUMENT

I. Default is Appropriate Where Respondents Have Failed to Answer the Complaint.

Respondents have failed to file an answer to the complaint within 30 days as required by 40 C.F.R. section 22.15(a). Forty C.F.R. section 22.17(a) dictates that any respondent that fails to file an answer to the complaint within 30 may be found in default. Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver or respondent's right to contest such factual allegations. 40 C.F.R. § 22.17(a).

Because Respondents have failed to file an answer to the Complaint, they should be held liable for all violations alleged in the Complaint, and a penalty should be assessed against them as set forth in paragraph 40 of the Complaint pursuant to 40 C.F.R. section 22.17(b). See In re Ace Environmental, Inc., 1999 WL 504701 (ALJ Bullock June 24, 1999); In re Ronald C.

Palimere, 2000 WL 33126605 (ALJ Moran, December 13, 2000); In re Lawrence County
Agricultrue Society, 2000 WL 1770502 (ALJ Gunning, October 26, 2000); In re Glen Welsh,
2000 WL 1660910 (Region 3 RJO, April 28, 2000).

**II. The Complaint Establishes All of the Prima Facie Elements of the Alleged
Violations.**

Because Respondents are in default, all of the factual allegations in the Complaint are deemed admitted by Respondents. Thus, in order to prevail in the instant matter, all Complainant must show that it has met its prima facie burden of establishing the elements of the violations alleged in the Complaint.

The Complaint establishes that Respondents are persons, Complaint ¶¶ 5 - 9, who discharged pollutants from a point source to waters of the United States. Id., ¶¶ 10-12. The Complaint also establishes that Respondents were issued two NPDES permits, Id., ¶ 13, and that they violated the terms of those permits. Id., ¶¶ 28-38.

Paragraphs 28-38 of the Complaint set forth the alleged violations of the NPDES permits. Each day of violation of a permit conditions constitutes a day of violation of the Act. 33 U.S.C. § 1311(a). These violations establish that Respondents violated the Clean Water Act more than 3,323 times. The numbers of days of violation are as follows:

¶ 28	no permit on site	3
¶ 29	NOI	1
¶ 30	exceedance of ZOD	5 years x 365 days = 1,825
¶ 31	annual reports	4
¶ 32	shoreline monitoring	4 years x days of operation ¹ = 477

¹Respondents operated approximately four to five months out of the year. See Response to EPA CWA section 308 Information Request (“Nautilus Foods, Annual Production Report, Dates of Operation,”) attached hereto as Exhibit C. Based on the dates of operation set forth in Exhibit C, and the shoreline monitoring data submitted with the Response to the 308 Information

¶ 33	BMPs	4
¶ 34	floating solids	1
¶ 35	ramp discharge	1
¶ 36	broken outfall	1.2 years x days of operation = 162
¶ 37	failure to op.& mnt.	5 years x days of operation = 601
¶ 38	grinder monitoring	<u>1 year x days of operation² = 120</u>
TOTAL		3,323 days of violation

While some question may surround exact number of days of violation, given the indisputably large number of violations, any small variation in the number should have no impact on the penalty. The penalty proposed in the Complaint can be achieved by showing approximately twelve days of violation of the Act. Thus, the large number of violations committed by Respondents supports and justifies the proposed penalty. Respondents should be held jointly and severally liable for the alleged violations. See In re Corporacion para el Desarrollo Economico y Futuro de la Isla Nena, (ALJ Biro July 15, 1998) (\$75,000 awarded jointly and severally against three defendants for CWA violations after one settled for \$40,000 and the other two failed to file an answer to the complaint).

III. The Proposed Penalty is Supported by the Facts.

The penalty proposed in the complaint is based on the penalty factors set forth in section 309(g) (3) of the Clean Water Act, which states in relevant part:

In determining the amount of any penalty assessed under this subsection, the Administrator or the Secretary, as the case may be, shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the

Request, it appears that Respondents monitored during part of 2001. Assuming for purposes of this motion that the data submitted indicate complete monitoring for that year, Respondents failed to monitor for four years, which equals 477 days of violation.

²No production data is available for 2002. The Region therefore arrived at 120, which is an average of the five previous years of operation reported by Respondents.

degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

33 U.S.C. § 1319(g)(3). All of the facts alleged in the Complaint, and set forth below to support the proposed penalty, are deemed admitted. 40 C.F.R. § 22.17(a).

The nature, circumstances, extent and gravity of the violations described above are significant. Respondents' failure to route all seafood process waste through the waste-handling system and to properly operate and maintain all facilities and systems of treatment and control that are installed or used to achieve compliance resulted in the deposition of excessive seafood process waste on the sea floor and in the water column. This has caused significant environmental harm to the water and sea bottom near the Outfall. In addition, Respondents have repeatedly failed to monitor discharges from the Facility and the surrounding environment as required by the 1996 permit and the 2001 permit. Unless a permittee monitors as required by the permit, it will be difficult if not impossible for state and federal officials charged with enforcement of the Clean Water Act to know whether or not the permittee is discharging effluent in excess of the permit's maximum levels.

Based on the information available to EPA regarding Respondents' financial condition, Respondent appears able to pay a civil penalty of up to \$137,500. Between 1997 and 2001, Respondents sold 22,584,354 pounds of fish³.

Respondents have an extensive prior history of violations. In 1992, EPA filed complaint against Nautilus Marine, Inc., a seafood processor owned by one or more of the Respondents in the present case, that operated the same facility that is at issue in the instant action, alleging

³See Response to EPA CWA section 308 Information Request ("Nautilus Foods, Annual Production Report, Total Production Volumes,") attached hereto as Exhibit C.

violations of the CWA. Prior to 1992, Respondents or predecessor companies owned by the same owner of Respondents received notices of violation from the Alaska Department of Environmental Conservation (“ADEC”). Inspectors from ADEC have also documented other violations of the CWA in the past at this facility.

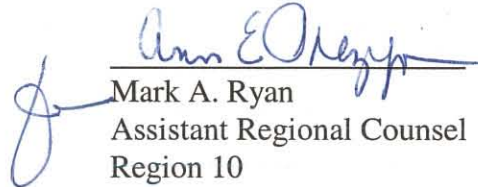
Respondents’ degree of culpability is high. Despite a prior history of violations, and prior knowledge of current and on-going violations, Respondents continue to violate the Clean Water Act. Each inspection of Respondents’ Facility has uncovered a large number of violations, and Respondents have been notified during these inspections of on-going noncompliance issues; yet these violations have continued largely unabated.

By delaying the costs associated with properly operating and maintaining all facilities and systems of treatment and control installed or used to achieve compliance and failing to route all seafood process waste through the waste-handling system, Respondents realized an economic benefit as a result of the violations alleged above. In addition, Respondents realized an economic benefit from failing to route all seafood process wastes; and failing to conduct seafloor, shoreline and surface water monitoring, or use other methods to ensure compliance with the permit provisions listed above.

CONCLUSION

For the reasons set forth above, the Presiding Officer should enter a Order finding Respondents in default, and assess the penalty proposed in the Complaint.

RESPECTFULLY SUBMITTED this 14th day of February, 2003.


Mark A. Ryan
Assistant Regional Counsel
Region 10

CERTIFICATE OF SERVICE

I certify that the foregoing "Motion for Default" was sent to the following persons, in the manner specified, on the date below:

Original and one copy, hand-delivered:

Carol Kennedy, Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Mail Stop ORC-158
Seattle, Washington 98101.

Copy, by mail:

Edward P. Weigelt, Jr.
4300 198th St. N.W.
Lynwood, WA 98036.

Dated: February 14, 2003 Melissa L. Whitaker
Melissa Whitaker
U.S. EPA Region 10